



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL CASE NO.58 OF 2013

PETER OWINO ATIENO.....APPELLANT

VERSUS

JOSHUA OTIENO ATIENO.....RESPONDENT

{An appeal from the Judgment and Decree of the Principal

Magistrate's Court at Siaya In Civil Case no.65 of 2011

delivered on 23rd March, 2012 by J.N. SANI (RM).}

JUDGMENT

1. **Peter Owino Atieno** , the Appellant, being dissatisfied with the Judgment and decree of the Principal Magistrates Siaya in Civil Case No.65 of 2011, delivered on 23rd March 2012 by Honourable J.N. Sani, R.M. filed this appeal through the memorandum of appeal dated 7th May 2012 setting out six grounds summarized as follows:

- a. That the learned trial magistrate erred in law and in fact by failing to hold that the Respondent registration with the land was in trust.
- b. That the learned trial magistrate erred in law and in fact in holding that the Respondent was the registered owner of the land without considering that the registration was procured through fraud as the family members had not agreed on the distribution of their father's estate who was initially the registered proprietor.
- c. That the learned trial magistrate erred in-law and in fact by failing to analyze the evidence and deciding the case against the weight of the evidence and law .

The Appellant prays for the appeal to be allowed and the Respondent's suit in the lower court be dismissed and the orders issued therein be set aside with costs.

2. The appeal was filed as Kisumu H.C.C.A NO.58 of 2013 and was admitted for hearing on the 16th February 2015. The on 1st September 2015 the appeal was forwarded to Siaya High Court for hearing and determination and placed before the Honourable judge on the 24th November 2015 when the matter was transferred to this court. The appeal came before this court for directions on 7th June 2016. The Appellant was in person while Mr. Ochieng advocate appeared for the Respondent. The Appellant

informed the court that he would rely on the record of appeal already filed and served. The learned counsel for the Respondent requested for time to file and serve written submissions. The court gave the parties a period of 30 days to file and serve submissions and fixed the matter for mention on the 26th July 2016. That when the matter came up on 26th July 2016, the Appellant indicated that he had no submissions to file. The counsel for the Respondent requested for three weeks to file and serve written submissions and another mention of 19th September 2016 was fixed. On the 19th September 2016 the learned counsel for the Respondent requested for another 14 days to file and serve their written submissions and again another mention of 6th October 2016 was fixed. On the 6th October 2016 counsel for the Respondent indicated that they would file their submissions in the day. The court then fixed the appeal for judgment.

3. The issues for this court's determination are as follows:

- a. Whether the learned trial magistrates' judgment was against the weight of the evidence and the law.
- b. Whether the appeal should be allowed.
- c. Who pays the costs.

4. That this being the first appeal, the court is required to analyze the evidence afresh and come to its own conclusions. The plaint in the record of appeal confirms that the Respondent, **Joshua Otieno Atieno** is the one who filed a suit against the Appellant, **Peter Owino Otieno** being **Siaya P.M.C.C.No. 65 of 2011** through the plaint dated 9th November 2011. The Respondent had averred that he was the registered proprietor of land parcel **East Alego/Kogelo Nyangoma/334** which was given to him by his father before his death. That his father had built a home for **Clementina Adhiambo Atieno**, the mother of Appellant on land parcel **Upando/Nyajuok/1650** before she moved to Tanzania in 1976 and remarried only to return in 2006. **That Clementina Adhiambo Atieno** died on 5th November 2011 and the appellant and his brothers wanted to bury her body **on East Alego/Kogelo Nyangoma/334** and hence this suit. The Respondent prayer in the plaint was for a permanent injunction restraining the Defendant by himself, his brothers or agents from burying the body of **Clementina Adhiambo Atieno** upon **East Alego/Kogelo Nyangoma/334** and costs. The appellant filed a statement of defence dated 21st November 2011 averring that the Respondent was registered, with the said land in trust for the Appellant and other members of the family of **Manas Atieno** (deceased) and therefore should be allowed to bury the body on that land. He prayed for the Respondent's suit to be dismissed with costs. The Respondent testified as **PW1** and called one Owino Nyuade who testified as **PW2**. The appellant testified as **DW1** and called his brother **Fredrick Opuro Atieno** who testified as **DW2**. The learned trial magistrate then delivered his judgment dated 23rd March 2012. This court has carefully considered the pleadings and the evidence adduced before the lower court by the four witnesses and noted the follows;

- a. That the copy of the register for land parcel **East Alego/Kogelo Nyangoma/334** was first registered in the names of **Manas Atieno** who is reportedly the father to the parties herein. The Respondent became the registered proprietor on the 13th May 1980 which was before coming into force of the Law of Succession Act Chapter 160 of Laws of Kenya which now guides administration and distributions of estates of deceased persons.
- b. That though the Respondent claimed that he got the said land from his father, the evidence he adduced before the lower court was that his father, **Manas Atieno**, died in 1978. The copy of the register confirms that the Respondent only got to be the registered proprietor on 13th May 1980 through Succession. This was about two years after the death of **Manas Atieno**. That among the documents presented before the learned trial magistrate was the certificate of Succession dated and registered on 13th May 1980.
- c. That the evidence adduced by the Appellant confirms that he had known that the Respondent was

registered as the proprietor of the suit land since 2008. That it appears nobody, including Appellant took any action to challenge the Respondent's registration with the land even though the appellant claimed the other family members had not conceded to the way their late father's estate was to be distributed.

d. That the evidenced adduced by the Appellant is that the Respondent was also registered with land parcel **Upanda/Nyajuok/1650** on which the Respondent wanted the said **Clementina's** body to be buried.

e. That the oral evidence adduced by the Respondent, Appellant and his brothers confirmed that the said Clementina last home was on land parcel **East Alego/Kogelo Nyangoma/334** where she had lived since coming back from Tanzania in 2006. That it is also on that land that the Appellant and some of the other family remembers lives. That this is an important fact that the trial court appear not to have considered in issuing the permanent injunction against the Appellant.

f. That among the documentary evidence availed was the proceedings and award of Nyanza Provincial Appeal Committee in case number 100 of 2011 which was between **Clementina Adhiambo Atieno and her sons including Appellant -V- the Respondent** over land parcel Siaya/Nyangoma/334. The appeals Committee findings are as set out herein below;

” **ISSUES/FINDINGS**

1. The land in dispute is family land.
2. The Appellant is the step mother of the Respondent .
3. The statement of appellant and her witnesses were not recorded by District Land Dispute Tribunal.
4. The Respondent confirmed that the appellant was present together with her witnesses and gave statement to the District Tribunal which did not appear in the proceedings from the District Land disputes Tribunal”.

That even though the award of the district Land Dispute Tribunal is not among the record of appeal, the memorandum of appeal filed with the Nyanza Provincial Appeal Committee and the proceedings thereof shows that the District Land Disputes Tribunal had ruled that **Clementina** should leave the suit land parcel **334** and move to parcel 1650. The Nyanza Provincial Appeals Committed allowed Clementina's appeal thereby allowing her to continue living on the suit land. The court finds that had the learned trial magistrate considered the Appeal Committee's ruling, the court would have come to a finding that **Clementina** having been one of the seven wives of **Manas Atieno**, who died on 1978 leaving the suit land registered in his names, and by the fact that she had lived on the suit land since 2006, and had waded off successfully the respondent's efforts to have her moved to parcel 1650 deserved to be burred on the suit land.

g. That to bury a body of a dead person on a land registered in the names of another does not confer any proprietary rights over the suit land to those arranging the burial. That the suit in the lower court was not about whether or not the Appellant had a legal or beneficial claim over the suit land. The issue was whether or not the body of said Clementina was to be interred on that land. That the court find that the body should have been buried on that land. The grant of permanent injunction against the Appellant in favour of the Respondent was therefore against the weight of the evidence adduced before the trial court .

h. That in view of the provisions of **Section 28** of the Land Registration Act No.3 of 2012 that came into operation on 2nd May 2012, and **Section 30** of the Registered Land Act **Chapter 300** of laws of Kenya (Repealed), the Respondent's registration with the suit land was subject to other overriding rights including customary trusts or the rights of person in possession or actual

occupation. That the finding of the learned trial magistrate that the permanent injunction would issue merely on the basis of registration as proprietor was not based on the law and facts.

5. That having found as above, the appeal by the Appellant succeeds, and the Respondent's case in lower court is hereby dismissed with costs in this court and the lower court.,

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF DECEMBER 2016

In presence of;

Appellant Present

Respondent Present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016

14/12/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties present

Respondent: My advocate was here but has left.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016

Court: Judgment dated and delivered in open court in presence of both parties.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016